STATE OF MICHIGAN
IN THE SUPREME COURT

STEVEN T. ILIADES and
JANE ILIADES, husband and wife,

Plaintiffs-Appellees,

vs.

DIEFFENBACHER NORTH AMERICA INC,
A Foreign Corporation,

Defendant-Appellant.

Supreme Court No. 154358
Court of Appeals No. 324726
LC No.: 12-129407-NP
(Oakland County Cir. Court)
Hon. Martha D. Anderson

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PLAINTIFFS' SUPPLEMENTAL BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

CERTIFICATE OF SERVICE

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I. **DID THE COURT OF APPEALS CORRECTLY HOLD THAT THE PRE-INJURY CONDUCT OF PLAINTIFF MAY CONSTITUTE COMPARATIVE NEGLIGENCE, REDUCING THE AMOUNT OF RECOVERY PROPORTIONATELY, BUT DOES NOT CONSTITUTE "UNFORESEEABLE MISUSE" COMPLETELY ABSOLVING A PRODUCT MANUFACTURER OF CIVIL ACCOUNTABILITY FOR ITS NEGLIGENCE?**

PLAINTIFFS/APPELLANTS ANSWER "YES"

COUNTER-STATEMENT OF FACTS

Overview

Plaintiff [1] was crushed while operating a rubber injection molding press at work. The press was designed and manufactured by Defendant Dieffenbacher, NA ("Defendant" or "Dieffenbacher").

This product liability suit was dismissed on summary disposition motion under MCR 2.116(C)(10) ("no genuine issue as to any material fact"). In the trial court's view, by reaching into the operating area of the press to retrieve finished parts that fell to the floor, Plaintiff engaged in "unforeseeable" "misuse" barring suit under MCL 600.2947(2) [Ex. B (granting summary disposition "for the reasons stated on the record"); Ex. C (transcript of argument on motion), pp. 16-17].[2]

On appeal, the Court of Appeals reversed (Ex. A). It held that it was an issue of fact for the jury whether Plaintiff engaged in "unforeseeable" "misuse" that would bar recovery under MCL 600.2947(2). Defendant now seeks Supreme Court review of the appellate decision allowing the case to go forward. The Court has requested supplemental briefing before oral argument of the Application.

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[1] This suit was brought on behalf of Steven Iliades, the man injured by the press, and his wife, Jane Iliades, for loss of consortium. The singular term "Plaintiff" refers to Mr. Iliades.

[2] Letter exhibits refer to the attachments to Plaintiff's Brief in Opposition to Application for Leave to Appeal ("P. Brief"). They are referred to accordingly in this Brief but are not reproduced.

The Press At Issue

Plaintiff was injured while using a Dieffenbacher DU 500 rubber injection press which was called "Press # 25" at Flexible Products, Plaintiff's employer. This press was purchased by Flexible Products in 1994. At that time, it was equipped with front safety doors. The Dieffenbacher engineer, Mr. Brumaru, described the purpose of the safety doors (Brumaru dep., Ex. F, pp. 34-35):

"Q. What was your understanding as the purpose of those safety doors?

A. Safety doors?

Q. Right. What's the purpose behind them?

A. To protect the operator from accidently entering the working area of the press.

Q. So it's to protect the operator from accidently entering the press while its operating?

A. Yes.

Q. Preventing them from being injured as a result of the press coming down on them?

A Or coming down or up.

Q. Either way?

A. Yes."

This safety feature was used, knowing that, "someone could get in the press and remove the materials" (Brumaru dep., p. 47). The front safety door prevented the operator's body from getting inside at the point of operation (Brumaru dep., p. 40).

However, maintenance issues and customer dissatisfaction with the barrier guard led to a change in the point of operation guarding in about 1997 (Brumaru dep., pp. 33-35, 75). During that time frame,[3] Dieffenbacher designed and installed, at the expense of Flexible Products, a "light curtain" guarding system (Brumaru dep., pp. 33-35, 45-46, 69). The retrofitting or upgrading to a light curtain was performed on "Press No. 25" and other Dieffenbacher presses.

Mr. Brumaru was versed in press manufacture, guarding, safety concerns and the like. He was familiar with the reality of some customers bypassing safety guards altogether (Brumaru dep., p. 37). The purpose of the light curtain was "to guard the press" (Brumaru dep., p. 40). In designing the light curtain, "I tried to imagine, foresee, every single possibility where someone can even try to kill himself" (Brumaru dep., p. 73).

In operation, the 500 ton rubber injection molding press would cycle when the top plate came down and compressed against the bottom plate, heating the rubber (Preston dep., Ex. G, pp. 22-23). Once the press cycle ended and the press stopped, the operator would remove the rubber manually (Preston dep., pp. 18, 21). The operator can only enter the press from the front (Preston dep., pp. 27-28). In going into the point of operation, the press operator is supposed to make sure that the press is stopped (Preston dep., pp. 30-31; Michalak dep., Ex. H p. 30).

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[3] There is a small measure of uncertainty about some specifics, since Defendant got rid of documentation about its rubber presses when it discontinued producing that product line (Brumaru dep., pp. 69-70).

The work sometimes entailed "going in the press" (Whiteside dep., Ex. I, p. 14). The safety curtain is, a "safety device to prevent the press from moving while you're in there..." (Whiteside dep., p. 15).

The press has a selector switch so that it can be operated in either automatic or manual mode (Michalak dep., p. 42). In manual mode, every movement of the press needs to be selected with either two push buttons, a joy stick or one push button for each step of the press cycle (Michalak dep., p. 39).

Plaintiff's Injury

On June 10, 2011, on the evening shift at Flexible Products, Plaintiff was working on Press 25 for the first time. When the cycle was completed, and rubber parts formed, he would remove the finished parts with a tool, sometimes referred to as a parts grabber, to inspect the parts (Iliades dep., Ex. K, pp. 50-51, 103-105). When the cycle stops. "[t]hen you go in to retrieve your parts" (Green dep., Ex. J, p. 17).

That evening, after the press completed its cycle, Plaintiff saw that some of the parts had popped off the plate on to the floor inside the press (Iliades dep., p. 105). Using the part grabber tool, Iliades reached into the press to remove the parts, crossing the light curtain, which was supposed to disable the press (Iliades dep., p. 105; Green dep., p. 28).

Most of the presses at Flexible Products, operating in "manual' mode, cannot restart when the light curtain is crossed until the operator manually re-starts the machine with a reset button (Iliades dep., p. 102, 128; Green dep., p. 28). However, Press No. 25 was set up so that it would automatically restart, without being reset by the operator,

when the "light curtain" sensed that the operator was no longer in the danger area (Green dep., pp. 15, 21).

As Plaintiff reached in to retrieve the fallen parts with the parts grabber, he got below the light curtain, causing the press to automatically recycle, trapping his upper torso in the press (Green dep., p. 31). He remained trapped in the press for about fifteen minutes as other workers struggled frantically to free him, unable to move the upper plate due to the light curtain (Iliades dep., p. 57; Green dep., pp. 8-10, 15-18). As a result of being crushed in the press, Plaintiff suffered fractured vertebrae, crush injuries to L1 to L4, second and third degree burns, PTSD, chronic pain disorder, major depression and permanent disfigurement.

The Lawsuit

Plaintiff filed this suit in Oakland County Circuit Court (Ex. L). In essence, it alleges that Dieffenbacher was negligent in the design and manufacture of the press and its safety features.

The Opinions of Plaintiff's Expert

The case was reviewed by Ralph Lipsey Barnett, an engineer who completed the course work for a doctorate in mechanics, has decades of experience, and numerous scholarly publications (Ex. M, Barnett c.v.). At his deposition (Ex. N), Mr. Barnett explained that the retrofitted light curtain should have provided equivalent or greater protection than the original interlock barrier guards (Barnett dep., p. 57).

In his opinion, the use of a light curtain to guard a dangerous motion (in this case the internal movement of the press) requires a manual reset to ensure that the operator is not still in the dangerous area of the press (Barnett dep., pp. 29-30):

> "Q. Is that to say that the design of the light curtain described in this manual is such that once it's installed, resetting it requires activating a control device?
>
> A. If you're using it as a guard. Let's see. This light curtain is an example of a modern light curtain, which means that it can be used in two different ways. The primary way is when it's used as a barrier guard, you are only able to stop the machine with the light curtain. You then can get permission after you withdraw something from the light curtain. You get permission to run the machine again, but in order to run the machine, you have to hit a start button, a reset button, something else. But also this light curtain could have been used as the total on and off. You reach through, you take your hands off, it starts, and then they have a special name for that, and I'll give you the name if I can go through the files, but this light curtain can be used, you know, in either mode."

Mr. Barnett offered several opinions, by way of Affidavit (Ex. O), in response to Defendant's Motion for Summary Disposition. Suffice it to note that no issue is now presented about the sufficiency of evidence of Dieffenbacher's negligence.

The Summary Disposition Ruling

After the discovery summarized above, Dieffenbacher filed its motion for summary disposition under MCR 2.116(C)(10) ("no genuine issue as to any material fact"). Plaintiff filed his Brief in Response (Ex. P, without attachments).

The motion was argued September 17, 2014 before Hon. Martha Anderson, Oakland County Circuit Court Judge (Ex. C, transcript of argument). At the conclusion of the argument she granted the motion, finding that, "plaintiff, Steven, misused the moulding press machine in question, and furthermore, that plaintiff, Steven's, misuse of the subject moulding press machine at the time of the subject incident, was not reasonably foreseeable by defendant, Dieffenbacher" (Ex. C, p. 16). In support of this conclusion, the Court cited evidence that Plaintiff had acted contrary to his training and safe practice in leaning into the press while the press was in "automatic" mode without using controls other than the light curtain to protect against recycling (Ex. C, pp. 16-18).

Plaintiff later filed a Motion for Reconsideration (Ex. Q). That motion was denied (Ex. D) and Plaintiff appealed.

The Court of Appeals Decision

The appeal was heard by a Court of Appeals panel comprised of Judges Ronayne Krause, Jansen and Stephens. The Court released its Opinion on July 19, 2016 (Ex. A).

The critical statute, MCL 600.2947(2), states:

> " A manufacturer or seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable. Whether there was misuse of a product and whether misuse was reasonably foreseeable are legal issues to be resolved by the court" (emphasis added).

Thus the statutory defense, to apply, required Defendant to show both "misuse" and that the misuse was not "reasonably foreseeable".

The majority (Judges Ronayne Krause and Stephens) presumed that Plaintiff "misused" the press when he reached in (Ex. A, p. 5, fn. 1). But, it concluded that reaching into the press to retrieve a rubber piece which the machine failed to eject was "reasonably foreseeable" (Ex. A, pp. 3-5).

> " The evidence strongly indicates that some manner of reaching into presses was simply how they operated, and consequently some risk of injury is indeed foreseeable. The entire point of the light curtains was, indeed, to prevent exactly that."
>
> * * *
>
> " It is worth noting that there was clear testimony to the effect that the light curtain installed on Press Number 25 did not work properly and would clear even if something was traversing the press opening, a 'surprising' fact known to a regular operator of that press, but plaintiff had never worked on that press before. With that one exception, the testimony was uniform that light curtains had never failed. Furthermore, the testimony that light curtains were not 'off switches' was somewhat ambiguous given the more or less contemporaneous testimony from the same witnesses that the light curtains did stop the presses and, indeed, that was their purpose. It appears that the reference was that light curtains did not shut down the presses."
>
> * * *
>
> " [T]he evidence at least raises a genuine question of fact whether finished products could be practically removed from the presses without reaching into them. Plaintiff clearly exposed himself to a risk of a much greater *degree* of harm than merely sticking an arm inside. But the *nature* of that conduct was exactly the same: assuming that he would be protected from the press by the light curtain, a safety device that gave every impression of being reliable. Indeed, plaintiff's

testimony suggested that for the most part, the light curtains were if anything *too* sensitive. Furthermore, defendant's electrical engineer testified that defendant was actually aware that clients were bypassing the safety doors that preceded the light curtains in the pursuit of continuing operations; it was thus actually aware that its clients incentivized operational efficiency at the cost of safety.

The evidence shows that plaintiff did not *completely* enter the press, the light curtains were supposed to have kept the press from cycling as long as some part of his body was sticking out of the press opening, and whether or not doing so was wise or even formally permitted, it was common practice to rely on the light curtains as sole safety devices. There is no testimony from any of his co-workers that he would have had reason to know that the light curtain on that particular press would be cleared if one got *between* the light curtain and the press, or that such an occurrence was even possible. We do not find, on this record, that plaintiff obviously committed gross negligence. In contrast, defendant knew that its customers might bypass safeties if doing so made press operation more efficient and that parts could not be retrieved from the press without *some* amount of entry thereinto. It might be reasonably expected that, in light of Flexible Products being one of defendant's biggest customers, defendant would have some familiarity with how the presses were actually used. It is no great cognitive leap to conclude that defendant should reasonably have anticipated that press operators might reach inside presses and, in so doing, not take the additional time to use any safety features other than the light curtain. As noted, the statute does not set a standard for egregiousness of misuse, but rather foreseeability." (footnotes omitted).

Judge Jansen dissented, explaining:

" I agree with the majority that some manner of accidental or nonaccidental reaching into a press while the press is in automatic mode was reasonably

> foreseeable, which is why the light curtain was installed. However, I disagree with the majority's conclusion that plaintiff's act of partially climbing into the press while the press was in automatic mode was reasonably foreseeable."

Supreme Court Proceedings

Defendant filed its Application for Leave to Appeal and Plaintiff filed his Brief in Opposition. By Order of April 7, 2017, the Court ordered oral argument to determine whether to grant the Application or take other action. The Court ordered supplemental briefing, "addressing whether the plaintiff Steven Iliades' conduct prior to being injured constituted misuse of the press machine that was reasonably foreseeable" Plaintiff now submits his Supplemental Brief pursuant to the April 7, 2017 Order.[4]

[4] The Order called for supplemental briefing within 42 days. With the gracious consent of defense counsel, the Court extended the time for Plaintiff's supplemental briefing, a courtesy for which Plaintiff and counsel are grateful.

ARGUMENT

I. AS THE COURT OF APPEALS CORRECTLY HELD, THE PRE-INJURY CONDUCT OF PLAINTIFF MAY CONSTITUTE COMPARATIVE NEGLIGENCE, REDUCING THE AMOUNT OF RECOVERY PROPORTIONATELY, BUT DOES NOT CONSTITUTE "UNFORESEEABLE MISUSE" COMPLETELY ABSOLVING A PRODUCT MANUFACTURER OF CIVIL ACCOUNTABILITY FOR ITS NEGLIGENCE

A quick summary of the 1978 product liability legislation can be found at pp. 20-21 of Plaintiff's Brief in Opposition to Application. As an overview, it codifies much of the State's prior judge-made product liability law, while adding some benefits to plaintiffs as a class (e.g. pre-Placek comparative negligence) while others aided Defendants as a class (e.g. damage caps). Two points are of particular significance to the question now before the Court.

First, the Legislature carefully distinguished two distinct forms of plaintiff behavior that affect recovery. The product liability statute seems to be the very first Michigan statute or decision to adopt the comparative negligence model. That provision states a legislative commitment that workers who are injured by the fault of a product manufacturer may still be compensated for the injury-causing fault of another, even though their own behavior was considerably less than careful in hindsight, but only in an amount diminished to the degree of his or her own fault. That approach stands in stark contrast to the outright abolition of resort to the courts for "unforeseeable misuse" which

would exempt even negligent manufacturers from civil accountability. In this way, the meaning of "misuse" which is not "reasonably foreseeable" is informed by the deliberate intent of the Legislature to limit the "unforeseeable misuse" defense to those extraordinary cases where the plaintiff's behavior is even more extreme than the carelessness, foolishness, or whatever other label might be applied to behavior regarded by the law as comparative negligence.

A second point for reflection is the separate nature of the terms "foreseeable" and "misuse". The law looks to real world usage of products. Equipment can be used in several ways, for several uses, by several types of people, with varying degrees of familiarity with the product. To use a simple example, unconnected to litigation, a hammer may be wielded by a carpenter to construct a massive building, or by a boy scout to pound the stake of a tent, or a young lady in college trying to hang a picture in her first home away from her parents. To have any rationality at all, product liability law must consider the variety of ways products are used by the widely diverse residents of this State. Thus "misuse" does not itself preclude recovery. Only when that "misuse" is not "reasonably foreseeable" can a manufacturer avoid accountability for its own fault.

A. PLAINTIFF'S PRE-INJURY CONDUCT MAY BE CONTRIBUTORY NEGLIGENCE BUT DOES NOT CONSTITUTE "MISUSE"

The term "misuse" is defined in MCL 600.2945(e):

> "'Misuse' means use of a product in a materially different manner than the product's intended use. Misuse includes uses inconsistent with the

> specifications and standards applicable to the product, uses contrary to a warning or instruction provided by the manufacturer, seller or another person possessing knowledge or training regarding use or maintenance of the product, and uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances."

The Court of Appeals majority found it unnecessary to definitively determine whether it was "misuse" for Iliades to reach into the press to retrieve the parts without shutting the press off first. This was because his conduct was "reasonably foreseeable", enabling him to proceed, under comparative negligence principles, regardless of whether that conduct is technically "misuse". Plaintiff agrees that the defense fails under the "reasonably foreseeable" standard regardless of "misuse". Suffice it to note that it is fairly debatable whether there was "misuse" at all in any real sense of that term as contrasted to damages-limiting comparative negligence

Turning to the first sentence, Plaintiff did not "use... a product in a materially different manner than the product's intended use". His use of the press was precisely "the product's intended use", producing rubber products on the press. The "manner" in which he did so is also unexceptional. When the manufactured rubber piece fell inside the machine he did what he was supposed to, he tried to retrieve it. To do this, he used the implement intended for that purpose, a parts grabber.

Defendant's real complaint is that Plaintiff reached too far and that he failed to shut the press completely off before reaching for the fallen parts. This may indeed be

negligent, but that scarcely makes the negligence "misuse" when the press was otherwise used for its purpose as a press.

The second sentence is the focus of Defendant's "misuse" argument. That sentence in MCL 600.2945(e) characterizes as misuse, "use contrary to a warning or instruction..." and "uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances". That definition presents considerable constitutional concerns in tandem with MCL 600.2945(2) which provides that, "whether there was misuse of a product and whether misuse was reasonably foreseeable are legal issues to be resolved by the court."

The second sentence of MCL 600.2945(e) embraces the standard "by a reasonably prudent person in the same or similar circumstance". That is an issue which is especially suited for decision by a jury, the community arbiter of how "reasonable" people behave. Moning v Alfono, 400 Mich 425, 435-436 (1977); Miller v Miller 373 Mich 519, 524-526 (1964). As M. Civ. J. I. 10.02 instructs juries, "The law does not say what a reasonably careful person using ordinary care would or would not do under [the] circumstances. That is for you to decide".

Yet the statute takes the issue of what reasonably prudent people would think from the jury and places that issue of fact in the hands of a trial judge. It does so with no direction as to how to weigh conflicting testimony, or alternative inferences, or any of the other traditional roles of a jury. It is difficult to avoid the conclusion that MCL 600.2945(e) and MCL 600.2947(2) violate Art. 1, § 14 of the Michigan Constitution by taking from the jury its historic function of deciding disputed issues of fact, like how

"reasonable" people behave. State Conservation Dept v Brown, 335 Mich 343, 346 (1952).

Looking beyond constitutional concerns, the middle section of the statute speaks to uses "contrary to a warning or instruction". To read that phrase broadly would create "misuse" if an employee said, "be careful" or "don't get hurt". That broad interpretation would label "misuse" any failure to unfailingly adhere to the cautionary words on page 124 of a car owner's manual, or the lectures of a safety engineer, as well as other negligent conduct that might appear foolish with the wisdom of hindsight. If all of these sub-optimum uses can be broadly defined as "misuse", that term is counter-balanced by the proviso that "reasonably foreseeable" conduct, even if "misuse", gives rise to a comparative negligence analysis, not outright dismissal.

B. PLAINTIFF'S CONDUCT WAS REASONABLY "FORESEEABLE"

Allowing recovery when "misuse" is "reasonably foreseeable" gives heed to the real world varieties in product use and product users. The simple hammer may be used by a carpenter to build a massive structure, or by a boy scout to pound stakes of a tent on a campout, or a young college student hanging a picture in her first home away from her parents, each with his or her own experience at hammer use and technique. The manufacturer of a more complex product like an industrial press is aware of conduct constituting misuse that is within the wide range of how consumers- - - yes comparatively negligent consumers who "misuse" - - might use the product. The contrast of "misuse" and "foreseeable" underscores that conduct which falls within the broad term "misuse" is

nonetheless actionable unless it is so far beyond the pale of comprehension as to be "unforeseeable" to the product engineers whose livelihood it is to determine the range of uses to which a product may be put. Thus, "unforeseeable" provides a very narrow escape hatch by which a negligent manufacturer is spared legal consequence for causing catastrophic injury.

Moving from the policy of product liability law to text, the term in question is "reasonably foreseeable", the ability to foresee the range of uses by a variety of workers in the industrial environment for which Defendant's products were designed. This is an environment in which the work is so repetitive as to be mind-numbing, where maintaining employment requires meeting production requirements. It is in this environment that Plaintiff's conduct, even if negligent, was nonetheless "foreseeable".

This Court's decision in Comstock v General Motors, 358 Mich 163, 180 (1959) says all that needs to be said about the meaning of "foreseeability":

> "The law does not require precision in foreseeing the exact hazard or consequence which happens. It is sufficient if what occurred was one of the kind of consequences which might reasonably be foreseen."

In this case, conduct like Plaintiff's was not only "foreseeable", it was actually foreseen. Mr. Brumaru was aware that press operators sometimes entered the danger area. The very purpose of the safety doors initially used was to prevent the press from cycling with an operator's body in the way (Brumaru dep., pp. 34-35, 40, 70). Similarly, the purpose of the light curtain was to prevent the press from cycling when the operator's body was in the crush area.

Regardless of instructions to the contrary, it was commonplace, indeed necessary, to reach into the machine to remove parts when the cycle finished (Preston dep., pp. 18-21; Whiteside dep., pp. 14-15; Green dep., p. 17). This could only be accessed from the front. In fact, Plaintiff was using a parts grabber furnished for that purpose.

Similarly, it was commonplace for the operator not to manually stop the press after every cycle. The Court of Appeals got it right:

> "...[D]efendant knew that its customers might bypass safeties if doing so made press operation more efficient and that parts could not be retrieved from the press without some amount of entry thereinto. It might be reasonably expected that, in light of Flexible Products being one of defendant's biggest customers, defendant would have some familiarity with how the presses were actually used. It is no great cognitive leap to conclude that defendant should reasonably have anticipated that press operators might reach inside presses and, in so doing, not take the additional time to use any safety features other than the light curtain."

Prior Michigan cases show that injuries like this are not merely "foreseeable", they actually occur, and with disturbing frequency. See, for example, the numerous Michigan cases cited at pages 18-19 of Plaintiff's Brief in Opposition involving injuries to body parts caught in industrial machinery. Illustrative is this Court's decision in Ghrist v Chrysler Corp, 451 Mich 242 (1996), where this Court reversed a summary disposition where the plaintiff was injured reaching into a press, finding the case jury-submissible despite the defendant's "foreseeability" argument. Several of the Court of Appeals cases likewise regard press/body contact as "reasonably foreseeable", even if the plaintiff's own conduct was also subject to criticism.

In sum, Plaintiff's conduct may be deemed "negligent", and might even be regarded as "misuse", but it was nonetheless "foreseeable" under the principles of Comstock and Ghrist. Leave to Appeal should be denied or the Court of Appeals affirmed.

RELIEF SOUGHT

WHEREFORE, Plaintiff STEVEN ILIADES and JANE ILIADES pray that this Honorable Court deny Defendant-Appellant's Application for Leave to Appeal.

Respectfully Submitted,

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